Issued by THE LABOR AND INDUSTRIAL RELATIONS COMMISSION

FINAL AWARD DENYING COMPENSATION
(Affirming Award and Decision of Administrative Law Judge)

Injury No.: 06-098956

Employee: Yolanda Bridges

Employer: Holiday Inn

Insurer: Pennsylvania Manufacturers

Additional Party: Treasurer of Missouri as Custodian of Second Injury Fund

Date of Accident: Alleged September 19, 2006

Place and County of Accident: St. Charles County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated December 19, 2007, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Karla Ogrodnik Boresi, issued December 19, 2007, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 17th day of June 2008.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

SEPARATE OPINION FILED
John J. Hickey, Member

Attest:

Secretary

SEPARATE OPINION

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based upon my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the denial of the administrative law judge should be affirmed, but for very different reasons.

In denying compensation for employee's alleged occupational disease, the administrative law judge found the following:

> Clearly, "the prevailing factor" is a more rigorous standard for compensability than the prior "substantial factor" test. [1]
> …
>
> The most convincing and credible expert evidence compels a finding in favor of Employer on the issue of causation. I find Claimant did not establish with reasonable probability that her job duties as a guest services representative are the prevailing factor in the development of her bilateral CTS…Having determined Claimant's CTS is not causally connected to her work, I find Claimant is not entitled to medical treatment or any other benefits, including permanency."

I deny compensation because the Missouri Workers' Compensation Law (Law) does not describe any benefits to be paid on account of occupational diseases. Having said that, I hope the Missouri courts and others smarter than me find authority in the plain language of the Law for the payment of benefits to occupational disease claimants. Strictly construing the statute, I found none.

2005 Amendments to the Workers' Compensation Law

Section 287.800.1 RSMo (2005)[2] provides that,"[a]dministrative law judges, associate administrative law judges, legal advisors, the labor and industrial relations commission, the division of workers' compensation, and any reviewing courts shall construe the provisions of this chapter strictly."

Section 287.020.10 RSMo provides:

> In applying the provisions of this chapter, it is the intent of the legislature to reject and abrogate earlier case law interpretations on the meaning of or definition of "accident", "occupational disease", "arising out of", and "in the course of the employment" to include, but not be limited to, holdings in: *Bennett v. Columbia Health Care and Rehabilitation*, 80 S.W.3d 524 (Mo.App. W.D. 2002); *Kasl v. Bristol Care, Inc.*, 984 S.W.2d 852 (Mo.banc 1999); and *Drewes v. TWA*, 984 S.W.2d 512 (Mo.banc 1999) and all cases citing, interpreting, applying, or following those cases.

"The language in section 287.020.10…serves as clarification of the fact that any construction of the previous definitions by the courts was rejected by the amended definitions contained in section 287.020…[I]t appears from the plain language of the statute, the legislature…intended to clarify its intent to amend the definitions and apply those definitions prospectively." *Lawson v. Ford Motor Co.*, 217 S.W.3d 345, 349 (Mo. App. 2007). Of particular interest in the instant case is the legislature's specific abrogation of all earlier case law

interpretations of the phrases “accident” and “occupational disease.”

Blank Slate

As to the phrases appearing in §287.020.10, the legislature has given us a blank slate. “The primary role of courts in construing statutes is to ascertain the intent of the legislature from the language used in the statute and, if possible, give effect to that intent. In determining legislative intent, statutory words and phrases are taken in their ordinary and usual sense. § 1.090. That meaning is generally derived from the dictionary. There is no room for construction where words are plain and admit to but one meaning. Where no ambiguity exists, there is no need to resort to rules of construction.” *Abrams v. Ohio Pacific Express*, 819 S.W.2d 338 (Mo. banc 1991) (citations omitted).

In light of the directives of §287.800 and the Missouri Supreme Court, our primary role is to strictly construe the Law giving the words and phrases their ordinary and usual meaning.

"The fundamental question in all compensation cases is whether the claimant is entitled to compensation…” *Harris v. Pine Cleaners, Inc*., 296 S.W.2d 27, 29 (Mo. 1956). “In a workers' compensation proceeding, liability is not fixed until it is determined from whom the employee is entitled to recover.” *Mikel v. Pott Indus*., 896 S.W.2d 624, 626 (Mo. 1995) (citation omitted). “[L]iability is not fixed until it is determined who is entitled to what from whom.” *Highley v. Martin*, 784 S.W.2d 612, 617 (Mo. App. 1989) (citations omitted). The “who” is the employee. The “whom” is the employer/insurer or the Second Injury Fund. See §§287.063.2, 287.067.8 and 287.220.1 RSMo. The “what” poses greater difficulties.

History of Occupational Disease Coverage under the Workers’ Compensation Law

At the heart of the Law is “the bargain” found in §287.120 RSMo, which provides, in relevant part:

> 1. Every employer subject to the provisions of this chapter shall be liable, irrespective of negligence, to furnish compensation under the provisions of this chapter for personal injury or death of the employee by accident arising out of and in the course of the employee's employment, and shall be released from all other liability therefor whatsoever, whether to the employee or any other person.
>
> 2. The rights and remedies herein granted to an employee shall exclude all other rights and remedies of the employee, his wife, her husband, parents, personal representatives, dependents, heirs or next kin, at common law or otherwise, on account of such accidental injury or death, except such rights and remedies as are not provided for by this chapter.

In exchange for a speedy and sure remedy for work-related injuries, employees gave up the right (in most instances) to sue their employers in civil suits. Employers, on the other hand, gave up their traditional defenses against such injury claims in exchange for certain liability under the Law and a release from all other liability. Section 287.120.1 imposes upon all employers the obligation to provide the benefits spelled out in Chapter 287. As will be shown, Chapter 287 spells out no benefits for occupational disease claimants.

When the Missouri Workman’s Compensation Law was originally adopted by referendum by the citizens of Missouri, occupational diseases were explicitly excluded from its coverage. Section 3301 RSMo (1929) provided for compensation only for personal injuries by accident.[3] Section 3305(b) RSMo (1929) specifically excluded occupational diseases from the definition of “injury” and “personal injuries.” Section 3305(b) provided, in relevant part:

> The term "injury" and "personal injuries" shall mean violence to the physical structure

> of the body and such disease or infection as naturally results therefrom. The said terms shall in no case be construed to include occupational disease in any form, nor shall they be construed to include any contagious or infectious disease contracted during the course of the employment, nor shall they include death due to natural causes occurring while the workman is at work… *Provided*, that nothing in this chapter contained shall be construed to deprive employees of their rights under the laws of this state pertaining to occupational diseases.

In 1931, the legislature amended section 3305(b) of the Law to allow employers and employees to elect coverage for occupational diseases:

> *Provided*, that nothing in this chapter contained shall be construed to deprive employees of their rights under the laws of this state pertaining to occupational diseases, unless the employer shall file with the commission a written notice that he elects to bring himself with respect to occupational disease within the provisions of this act and by keeping posted in a conspicuous place on his premises a notice thereof to be furnished by the commission, and any employee entering the services of such employer and any employee remaining in such service thirty days after the posting of such notice shall be conclusively presumed to have elected to accept this section unless he shall have filed with the commission and his employer a written notice that he elects to reject this act. (Bold emphasis added).[4]

Notwithstanding the addition of language to §3305(b) to add optional coverage for occupational diseases, the legislature did not modify §3301 to expressly provide that employers were liable to pay compensation for occupational diseases irrespective of negligence or that employers were released from other liability arising from occupational diseases.

Compensability of Occupational Disease Claims

Before addressing the merits of employee's claim, I must consider 1) whether the Law, as amended, applies to occupational diseases; 2) the meaning of "occupational disease" under the Law, as amended; 3) whether occupational diseases are compensable under the Law, as amended; and, 4) if so, what amount of compensation is due on account of occupational disease.

1) Does the Law apply to occupational diseases? It clearly does. Section 287.110 RSMo provides:

> 1. This chapter shall apply to all cases within its provisions except those exclusively covered by any federal law.
>
> 2. This chapter shall apply to all injuries received and occupational diseases contracted in this state, regardless of where the contract of employment was made, and also to all injuries received and occupational diseases contracted outside of this state under contract of employment made in this state, unless the contract of employment in any case shall otherwise provide, and also to all injuries received and occupational diseases contracted outside of this state where the employee's employment was principally localized in this state within thirteen calendar weeks of the injury or diagnosis of the occupational disease.

2) What is the meaning of "occupational disease" under the Law? Section 287.067.1 RSMo defines "occupational disease."

> In this chapter the term "occupational disease" is hereby defined to mean, unless a different meaning is clearly indicated by the context, an identifiable disease arising with or without human fault out of and in the course of the employment. Ordinary diseases of life to which the general public is exposed outside of the employment shall not be compensable, except where the diseases follow as an incident of an occupational disease as defined in this section. [5] The disease need not to have been foreseen or expected but after its contraction it must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a rational consequence.

It is worthy of note, by definition, occupational diseases are causally connected to work.

3) Are occupational diseases compensable under the Law? By the express language of §287.067, injuries sustained by occupational disease or repetitive motion are compensable subject to the restrictions set forth in the various sections of §287.067, including the "prevailing factor" restriction.

> 2. An injury by occupational disease is compensable only if the occupational exposure was the prevailing factor in causing both the resulting medical condition and disability. The "prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability. Ordinary, gradual deterioration, or progressive degeneration of the body caused by aging or by the normal activities of day-to-day living shall not be compensable.
>
> 3. An injury due to repetitive motion is recognized as an occupational disease for purposes of this chapter. An occupational disease due to repetitive motion is compensable only if the occupational exposure was the prevailing factor in causing both the resulting medical condition and disability. The "prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability. Ordinary, gradual deterioration, or progressive degeneration of the body caused by aging or by the normal activities of day-to-day living shall not be compensable.
>
> …
>
> 7. Any employee who is exposed to and contracts any contagious or communicable disease arising out of and in the course of his or her employment shall be eligible for benefits under this chapter as an occupational disease.
>
> 8. With regard to occupational disease due to repetitive motion, if the exposure to the repetitive motion which is found to be the cause of the injury is for a period of less than three months and the evidence demonstrates that the exposure to the repetitive motion with the immediate prior employer was the prevailing factor in causing the injury, the prior employer shall be liable for such occupational disease.

4) What amount of compensation is due on account of occupational diseases?
Section 287.067 says many things but it does not specify, quantify, or describe any amount of compensation (the "*what*") due for the occupational diseases described. Section 287.063 also deals with occupational diseases. That section provides, in part:

> 1. An employee shall be conclusively deemed to have been exposed to the hazards of an occupational disease when for any length of time,

however short, he is employed in an occupation or process in which the hazard of the disease exists, subject to the provisions relating to occupational disease due to repetitive motion, as is set forth in subsection 8 of section 287.067.

2. The employer liable for the compensation in this section provided shall be the employer in whose employment the employee was last exposed to the hazard of the occupational disease prior to evidence of disability, regardless of the length of time of such last exposure, subject to the notice provision of section 287.420.

3. The statute of limitation referred to in section 287.430 shall not begin to run in cases of occupational disease until it becomes reasonably discoverable and apparent that an injury has been sustained related to such exposure, except that in cases of loss of hearing due to industrial noise said limitation shall not begin to run until the employee is eligible to file a claim as hereinafter provided in section 287.197.

Despite the empty promise in subsection 2 of "compensation in this section provided," §287.063 does not specify, quantify, or describe any amount of compensation (the "*what*") due for the occupational diseases described.

Because §§287.063 and 287.067 do not describe *what* workers' compensation benefits are due an occupational disease claimant, I must move on through Chapter 287 looking for a statute spelling out the compensation due for the contraction of an occupational disease.

Section 287.120.1 sets forth the basic right of recovery for workers' compensation. That section provides that an employer is liable to an employee for workers' compensation benefits if the employee sustained personal injury *by accident* arising out of and in the course of his employment. Accident is clearly defined in §287.020.2:

The word "accident" as used in this chapter shall mean an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift.

The definitional requirement that an injury by accident must be caused by a specific event during a single work shift excludes occupational diseases from the reach of §287.120 RSMo.

I next visit the statutory sections defining and quantifying particular workers' compensation benefits to see if they set out *what* compensation is due an occupational disease claimant. Relevant portions of selected statutes are set forth below.

287.140.1 -- Medical Care "In addition to all other compensation paid to the employee under this section, the employee shall receive and the employer shall provide such medical,…as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury."

287.170.1 -- Temporary Total Disability "For temporary total disability the employer shall pay compensation…at the weekly rate of compensation in effect under this section on the date of the injury for which compensation is being made. The amount of such compensation shall be computed as follows… (4) For all injuries occurring

on or after August 28, 1991, the weekly compensation shall be an amount equal to sixty-six and two-thirds percent of the injured employee's average weekly earnings as of the date of the injury; provided that the weekly compensation paid under this subdivision shall not exceed an amount equal to one hundred five percent of the state average weekly wage;

287.190.1 -- Permanent Partial Disability "For permanent partial disability… the employer shall pay to the employee compensation computed at the weekly rate of compensation in effect under subsection 5 of this section on the date of the injury for which compensation is being made…"

287.200.1 -- Permanent Total Disability "Compensation for permanent total disability shall be paid during the continuance of such disability for the lifetime of the employee at the weekly rate of compensation in effect under this subsection on the date of the injury for which compensation is being made. The amount of such compensation shall be computed as follows:…
(4) For all injuries occurring on or after August 28, 1991, the weekly compensation shall be an amount equal to sixty-six and two-thirds percent of the injured employee's average weekly earnings as of the date of the injury…"

Each section quoted above specifies *what* benefit is due on account of and in relation to *injuries*. A review of §§287.240 (burial and death benefits), 287.241 (rehabilitation benefits), 287.190 (temporary partial disability), and 287.220 (Second Injury Fund benefits) reveals they are only available for injuries, too.

So, is an occupational disease an injury? Section 287.020(5), the modern-day incarnation of §3305 RSMo (1929), defines "injury":

The terms "injury" and "personal injuries" shall mean violence to the physical structure of the body and to the personal property which is used to make up the physical structure of the body, such as artificial dentures, artificial limbs, glass eyes, eyeglasses, and other prostheses which are placed in or on the body to replace the physical structure and such disease or infection as naturally results therefrom. These terms shall in no case except as specifically provided in this chapter be construed to include occupational disease in any form, nor shall they be construed to include any contagious or infectious disease contracted during the course of the employment, nor shall they include death due to natural causes occurring while the worker is at work. (Emphasis added).

My review of Chapter 287 reveals no statutes wherein the legislature specifically provided that "injury" or "personal injuries" include occupational disease. I find the phrases "injury *by* occupational disease" and "injury *by* repetitive trauma" in §287.067. My natural inclination is to interpret these phrases in such a manner as to effectuate what I believe may have been the legislature's intent (to specifically state that injury includes occupational disease for some purposes). However, the phrases are not ambiguous so under the strict construction mandate of §287.800, I must apply them as they read.

Chapter 287, §§140, 170, 180, 190, 200, 220, 240, and 241 all set out benefits due on account of injuries. Injuries for purposes of the Law expressly do not include occupational diseases and they never have.

The Workmen's Compensation Act, as it was originally passed in this State, expressly excluded occupational disease and covered accidental injuries only.

> The words "accident," "injury," and "personal injuries" were carefully defined in the original Act, but, of course, were not intended to apply to occupational disease in any form because such disease was specifically excluded from the operation of the Act. [Sec. 3305, R. S. Mo. 1929 (Mo. Stat. Anno., sec. 3305, pp. 8238, 8239).] In 1931 the Legislature amended the above section of the Act by providing that an employer could elect to come under the Act as to occupational diseases. The amendment, however, did not change the definitions contained in said section and did not define "occupational diseases." It is, therefore, the duty of the courts to determine and apply the meaning of the terms mentioned in the above section in connection with occupational disease cases, even though they were not originally intended to apply to such cases.

Renfro v. Pittsburgh Plate Glass Co., 130 S.W.2d 165, 171 (Mo. App. 1939) (determining the meaning of "accident," "injury," and "personal injuries.") (Emphasis added). The above-referenced sections setting forth the benefits due for injuries do not set out *what* compensation is due on account of occupational diseases.

Could it be that the legislature has repeatedly forgotten to explicitly declare *what* compensation an employer owes to an employee who sustains an occupational disease under the Law? Indeed, successive legislatures – including the legislature that first extended the Law to occupational diseases in 1931 – have repeatedly failed to explicitly so declare.

In 1957, the Missouri Supreme Court pointed out that the plain language of the Law does not explicitly set out compensation for occupational diseases. In *Staples v. A. P. Green Fire Brick Co.*, 307 S.W.2d 457 (Mo. 1957), the Court was asked to rule that deaths from occupational diseases were not subject to the 300-week limit found in §287.020(4)[6], because that limit explicitly applied to deaths occurring within three hundred weeks "after the accident." In rejecting the contention that "accident" should be so narrowly construed, the Court pointed out that even the basic right of recovery under the Law is limited to injury or death "by accident" and does not explicitly extend to occupational diseases.

> [I]t might be held with equal logic that there could be no recovery of weekly compensation at all in occupational disease cases, for § 287.120(1) which provides the basic right of recovery of compensation under the Act specifies that compensable injury or death shall be "by accident."

Id. at 463.

Until now, Missouri courts have saved the populace from the General Assembly's repeated failure to explicitly provide workers' compensation benefits to occupational disease claimants. [7] Under the liberal interpretation permissible under the Law until August 28, 2005, the courts were allowed to effect legislative intent through common sense interpretations of the Law. "Construction of statutes should avoid unreasonable or absurd results." *Reichert v. Bd. of Educ*., 217 S.W.3d 301, 305 (Mo. banc 2007) (citation omitted). It indeed would have been an absurd result if the *Renfro* court or the *Staples* court had concluded that the Law did not provide compensation for occupational diseases in light of the 1931 occupational disease amendment. It would be nice to rely on the wisdom of the *Staples* court now but I cannot because the legislature abrogated all cases interpreting the meaning of "accident." I have been specifically directed by the legislature "to construe the provisions of [Chapter 287] strictly," so that is what I will do.

"'The legislature is presumed to know the existing case law when it enacts a statute." *Hudson v. Dir. of Revenue*, 216 S.W.3d 216, 222-223 (Mo. App. 2007) (citation omitted). Therefore, I must presume that when the legislature abrogated the cases that expanded the definition of "injury" and "accident" to bring

occupational diseases within the breadth of Chapter 287, and §287.120 in particular, the legislature was aware the courts had already pointed out that the plain language of §287.120 did not provide for the payment of workers' compensation benefits on account of occupational diseases or for the release of employer from other liability resulting therefrom.[8] The legislature's failure to so provide when amending the Law must be presumed purposeful.

The Law, as amended, does not set forth any compensation due on account of occupational diseases.

Conclusion

It is clear the Law provides for occupational diseases. See §287.110. "We do not understand the words 'provided for' to mean 'compensated for.' …It follows that, if a right or remedy be completely destroyed by the act, it would be 'provided for' or 'prescribed' or 'defined,' as we interpret those words." *Holder v. Elms Hotel Co.*, 92 S.W.2d 620, 622 (Mo. 1936). Unfortunately for claimant, and countless workers like her, what the legislature *provided* to those sustaining non-accidental harm to their bodies arising out of and in the course of employment is nothing. Occupational disease claimants may have to resort to the courts to recover damages for their personal injuries.

Claimants will not bear the inconvenience alone. Although employers may initially rejoice upon discovering that §287.120.1 does not make an employer liable for workers' compensation benefits to an occupational disease claimant, that joy may be tempered when employers discover that they are liable to occupational disease claimants under §§287.063 and 287.067 without the benefit of the release from other liability set out in §287.120.2. Then again, employers will be somewhat comforted upon learning that the compensation they owe under Chapter 287 is zero dollars.

Arguably, the result of the 2005 changes to the Missouri Workers' Compensation Law, including the blanket abrogation of common law interpretations, is that Missouri law regarding recovery for occupational diseases has reverted to what it was in the early twentieth-century, when occupational disease cases were pursued in the courts through personal injury lawsuits.[9]

For the foregoing reasons, I begrudgingly concur in the decision to deny compensation.

_____

John J. Hickey, Member

FINAL AWARD

Employee: Yolanda Bridges

Injury No.: 06-098956

Dependents: N/A

Before the
Division of Workers' Compensation
Department of Labor and Industrial Relations of Missouri
Jefferson City, Missouri

Employer: Holiday Inn

Additional Party: Second Injury Fund

Insurer: Pennsylvania Manufacturers

Hearing Date: October 15, 2007

Checked by: KOB:dwp

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No.

2. Was the injury or occupational disease compensable under Chapter 287? No.

3. Was there an accident or incident of occupational disease under the Law? No.

4. Date of accident or onset of occupational disease: Alleged September 19, 2006.

5. State location where accident occurred or occupational disease contracted: St. Charles County, Missouri

6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.

7. Did employer receive proper notice? Yes.

8. Did accident or occupational disease arise out of and in the course of the employment? No.

9. Was claim for compensation filed within time required by Law? Yes.

10. Was employer insured by above insurer? Yes.

11. Describe work employee was doing and how accident happened or occupational disease contracted: Claimant alleged her work as a guest services representative was the prevailing factor in her carpal tunnel syndrome.

12. Did accident or occupational disease cause death? No.

13. Parts of body injured by accident or occupational disease: alleged bilateral hands.

14. Nature and extent of any permanent disability: None.

15. Compensation paid to-date for temporary disability: $0.00

16. Value necessary medical aid paid to date by employer/insurer? $0.00

17. Value necessary medical aid not furnished by employer/insurer? N/A

Employee: Yolanda Bridges Injury No.: 06-098956

18. Employee's average weekly wages: $298.20

19. Weekly compensation rate: $198.80 / $198.80

20. Method wages computation: By agreement.

COMPENSATION PAYABLE

21. Amount of compensation payable: None

22. Second Injury Fund liability: Dismissed.

TOTAL: $ 0.00

23. Future requirements awarded: None.

Each of said payments to begin n/a and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of n/a of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: n/a

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Yolanda Bridges

Dependents: N/A

Employer: Holiday Inn

Additional Party: Second Injury Fund

Insurer: Pennsylvania Manufacturers

Injury No.: 06-098956

Before the
Division of Workers' Compensation
Department of Labor and Industrial Relations of Missouri
Jefferson City, Missouri

Checked by: KOB:dwp

PRELIMINARIES

The matter of Yolanda Bridges ("Claimant") proceeded to hearing in Saint Charles County on October 15, 2007. Attorney Louise Ryterski represented Claimant. Attorney Nanci Martin represented Holiday Inn Select ("Employer"), and its insurer, Pennsylvania Manufactures Association c/o Gallagher Bassett.

The parties stipulated that as of September 19, 2006, Claimant was an employee of Employer earning an average weekly wage of $298.20; The rate of compensation for both total and partial disability benefits of $198.80; and venue, notice, timeliness of the claim, and coverage of the Act were not at issue. Employer denied the claim and has not paid any benefits.

The primary issue is whether Claimant's work is the prevailing factor in causing her carpel tunnel syndrome ("CTS"). If that question is answered in favor of Claimant, the secondary issue is whether Claimant is entitled to receive medical treatment. Finally, Claimant requested the court consider whether Claimant is entitled to receive permanent partial disability compensation if it is determined she is not entitled receive additional medical care. Employer seeks a final award denying all liability for benefits. The parties agree the Second Injury Fund claim should be left open only if the Award favors Claimant on the issue of compensability.

FINDINGS OF FACT

Claimant is a 45-year-old, right-handed woman who is less that five feet tall and weighs 177 pounds. She smokes eight to ten cigarettes a day, and has high blood pressure, which is now controlled by medication but has in the past been out of control. She has never been diagnosed with arthritis, diabetes, or

thyroid problems.

Employer hired Claimant to work at the Saint Peters location in July, 1997. After brief stints in other departments, Claimant went to work at the front desk in guest services in February 1998, where Claimant currently works up to eight hours a day, averaging 35 to 40 hours per week. Claimant testified credibly regarding her duties. Her description of her job was consistent with Employer's exhibit #2, the official job description of guest service representative, although Claimant's testimony contained more details. The duties of the guest services representative are divided into five basic categories: check in/out, reservations, switch board, handling cash and miscellaneous duties.

Claimant is responsible for greeting all hotel guests, registering guests at check in, and verifying information upon check out, including payment of all charges. According to Claimant, check-in/out involved use of the mouse and keyboard. Claimant had to pull up the reservation, enter data by key and mouse, and insert credit card numbers. She also had to fold up to 100 key envelopes a day. For each guest, Claimant used her right hand to prepare two keys using the computer keypad. She would then insert the key cards into the envelope. She made up to 120 keys a day. Sometimes Claimant also had to prepare welcome letters for groups by folding printed information and placing it into the check-in folder.

Claimant also operated the Holidex system to take reservations. In addition to communicating with future guests, Claimant had to key in date of arrival, room request, dates of visit, name and address, and club numbers in addition to any credit card information that was required. Claimant estimated it took anywhere from three to eight minutes per reservation to enter all relevant information. She also estimated she took five to sixty reservations on any given day. Claimant stood when performing her data entry. She held her arms at a slightly lower angle than 90 ? , such that her arms were operating near her belly button level on the keyboard. There were no wrist supports on any of the computers. Of the three computers, only two had swipers which helped her avoid entering credit card information.

Claimant had primary responsibility for operating the switchboard. She answered incoming calls to guest rooms and hotel departments. She took and delivered messages, programmed wake-up calls, and often had to accept reservations over the phone. She answered and transferred calls by keying in extension numbers and pressing a transfer button.

At the end of her shift, Claimant was required to count all cash received on her shift. She had to run a cashier's report and use a calculator in addition to counting the money and credit card receipts. This task took approximately 45 to 60 minutes.

Finally, as a guest service representative, Claimant was responsible for any additional duties assigned by her supervisors. This included maintaining log books of customer requests and referring such requests to other departments, running the copy and fax machines, and generating a variety of computerized reports. Claimant performed clerical work such as copying and cutting coupons for complementary services provided to the guests.

Claimant had no set breaks, but she called for relief from other hotel employees. She generally ate her lunch at the work station. She worked from seven to three o'clock, four to five days a week. Claimant estimated of her typical eight hour day, she spent seven hours using her hand in some way, whether entering data with both hands into the computer, using a mouse, using her right hand on the computer keypad, the phone keypad, the key card keypad, or manipulating a variety of office tools such as the copier, printer, or paper cutter.

In 2004, Claimant began to experience bilateral hand complaints, greater on the right than left. She described pain and a "jamming" sensation in the wrist area, which got worse and progressed up her arm over time. Claimant reported her problems to Employer, who sent her to Dr. Ollinger. Dr Ollinger did an

assessment and diagnosed carpel tunnel, but concluded it was not work related. Claimant had no treatment and continued to work.

In 2005, Claimant became the sole guest services representative on duty during her shift. Without help, Claimant noticed her symptoms have gotten worse. Currently, her right hand is numb from each finger tip to the wrist. During the day the numbness extends to the elbow, but it can go up to the shoulder at night. She experiences daily pain, and awakes three to four times per week with night pain, mainly at the wrist and elbow. She takes up to eight Tylenol per day, wears an Ace bandage at home, and relies on rest and massage to help control the pain. She testified she constantly drops things and experiences cramping bilaterally. Claimant's left hand has more of a tingling sensation, mostly in the palm of her hand. She has occasional numbness and experiences pain at a level of five on a scale of one to ten. Her symptoms come and go. Claimant testified work is difficult to do due to the pain, her penmanship has gotten worse, her household actives had been impacted, and she has some difficulty dressing due to the problems with her hands.

Claimant testified she had no hand problems before working for Employer. However, in 2002, she had some tingling in the left shoulder, and experienced problems with a stiff neck without any traumatic injury. She had an MRI, received medication, and underwent treatment for a couple of months. She does not recall any lasting problems from that episode.

On cross examination Claimant testified she has been hospitalized in the past from high blood pressure and within the last year, has been hospitalized for stress including an episode of high blood after she had not taken her pill. Claimant testified she had no knowledge of having carpel tunnel syndrome until she saw Dr. Ollinger. Claimant testified her work is seasonal and that in months such as July volume is very high. Throughout the day, the pace of her work is sporadic.

Mr. Steven Dye, general manager of Employer, testified, confirming much of the information provide by Claimant and the guest services representative job description. Although he described three other women who perform the guest services representative role, none have been employed as long as Claimant, and all primarily work in the evening, not the day shift like Claimant. Even the guest services manager works more afternoons into the evenings and is not generally there when Claimant is working. Mr. Dye is present when Claimant works, and steps in to help Claimant if necessary.

Mr. Dye described the front desk as the communications center of the hotel. He confirmed Claimant took phone reservations and general calls, all which involved manipulation of the phone and keyboard. She had to check guests in and out, converse with the guests, track down the general manager to address problems, maintain hand-written guest activity logs, communicate by phone or radio, and perform other tasks as previously described. Mr. Dye confirmed as a general rule the business is busier on the weekends, and certain months are busier than others. He confirmed Claimant works solo, and is good, honest, and dependable.

Medical Evidence

Dr. Henry Ollinger examined Claimant once, on October 8, 2004, and the parties agreed to submit his report in lieu of his live or deposition testimony. He took a history consistent with the evidence, although Employer estimated Claimant worked fewer hours than she reported. Claimant's onset of symptoms started on the right hand, with pain, numbness, and tingling. On exam, the primary finding was a positive Phalens of the right. Claimant displayed risk factors of 1) her gender and age; 2) her obese status; and 3) her smoking habit. Based on what Claimant told him, Dr. Ollinger did not see work as the proximate cause or substantial factor for right CTS,[10] especially considering the job force, repetition, posture, contact stress and duration. Notwithstanding his beliefs regarding causation, in 2004 Dr. Ollinger felt Claimant needed a nerve test.

Dr. Robert Poetz examined Claimant once, on June 12, 2007, and the parties agreed to submit his report in lieu of his live or deposition testimony. Claimant's chief complaints to Dr. Poetz included right wrist and arm pain, finger tip numbness, nighttime numbness and tingling, poor penmanship, and weakness. The vocational history considered was similar to, although less detailed than, the history established by the evidence. As for the history of present illness, Dr. Poetz stated "[t]he patient attributes the repetitive use of her hands in performing the above job duties to the development of her bilateral hand complaints." On exam, Dr. Poetz noted atrophy, decreased pinprick sensation, and positive Phalen's and Tinel's signs bilaterally. He diagnosed bilateral carpal tunnel syndrome, and among other recommendations suggested Claimant needs a nerve study followed by surgical intervention if indicated. Despite mention of further tests, Dr. Poetz was silent as to the issue of additional treatment. Rather, he found the condition permanent, stating "the injury, which occurred on September 19, 2006, is the substantial and prevailing factor to" the permanent partial disability ratings of 30% of the right hand and 25% of the left hand, each "directly resultant from the September 19, 2006 work related injury."

RULINGS OF LAW

Having given careful consideration to the entire record, based upon the above testimony, the competent and substantial evidence presented, and the applicable law of the State of Missouri, I find the following:

1. Prevailing Factor.

In 2005, the legislature amended several sections of the Missouri Workers' Compensation Act. In particular, portions of §§ 287.067 and 287.020 were rewritten. Specifically, §287.067.2 discusses when an injury by occupational disease is considered compensable. Prior to 2005, the section stated that such an injury will be compensable if it "is clearly work related and meets the requirements of an injury which is compensable as provided in subsections 2 and 3 of section 287.020." Subsections 2 and 3 of § 287.020 previously contained definitions for "accident" and "injury." Prior to 2005, those definitions included language which concluded that an injury was compensable if it is work related, which occurs if work was a "substantial factor" in the cause of the disability.

After the 2005 amendments, the definition of a compensable injury by occupational disease was changed to use the language "prevailing factor" in relation to causation. Specifically, §287.067.2 states:

An injury by occupational disease is compensable only if the occupational exposure was the prevailing factor in causing both the resulting medical condition and disability. The 'prevailing factor' is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability. Ordinary, gradual deterioration or progressive degeneration of the body caused by aging or by the normal activities of day-to-day living shall not be compensable.

Section 287.020.3 defines "injury" using similar terms. *Lawson v. Ford Motor Co.*, 217 S.W.3d 345, 348 - 349 (Mo.App. E.D. 2007). The legislature also added §287.020 stating its intent "to reject and abrogate earlier case law interpretations on the meaning of or definition of 'accident,' 'arising out of,' and 'in the course of the employment'...."(New subsection 10). Clearly, "the prevailing factor" is a more rigorous standard for compensability than the prior "substantial factor" test.

Despite the statutory changes, the basic burden of proof is constant. Claimant must establish, generally through expert testimony, the probability that the claimed occupational disease was caused by conditions in the work place. *Selby v. Trans World Airlines, Inc*., 831 S.W.2d 221, 223 (Mo. App. W.D. 1992). Claimant must prove "a direct causal connection between the conditions under which the work is performed

and the occupational disease." *Webber v. Chrysler Corp*., 826 S.W.2d 51, 54 (Mo. App. 1992); *Sellers v. Trans World Airlines, Inc*., 752 S.W.2d 413, 415 (Mo. App. 1988). A single medical opinion will support a finding of compensability even where the causes of the disease are indeterminate *Dawson v. Associated Electric*, 885 S.W.2d 712, 716 (Mo. App. W.D. 1994). The opinion may be based on a doctor's written report alone. *Prater v. Thorngate, Ltd*., 761 S.W.2d 226, 230 (Mo. App. 1988). Where the opinions of medical experts are in conflict, the fact finding body determines whose opinion is the most credible. *Hawkins v. Emerson Electric Co*., 676 S.W.2d 872, 877 (Mo. App. 1984). Where there are conflicting medical opinions, the fact finder may reject all or part of one party's expert testimony which it does not consider credible and accept as true the contrary testimony given by the other litigant's expert. *George v. Shop ' N Save Warehouse Foods Inc*., 855 S.W.2d 460, 462 (Mo. App. E.D. 1993); *See also Kelley v. Banta & Stude Construction Co., Inc.*, 1 S.W.3d 43, 48 (Mo.App. E.D. 1999).

There are no major factual disputes in this case. Claimant testified credibly, each expert appeared to have a solid understanding of the work Claimant did with her hands on a regular basis, and there is nothing contradicting the diagnosis of CTS. Rather, this case presents a classic credibility battle of the experts.

Between the two experts, I find the opinion of Dr. Ollinger to be more credible and convincing than that of Dr. Poetz. In finding work was not a proximate cause or substantial factor for right CTS, Dr. Ollinger provided a two-fold explanation for his conclusion. First, he identified several risk factors Claimant has for the development of CTS (gender/age, weight, and smoking habit). Next, he explained why he found Claimant's duties as a guest services representative are not the proximate cause or a substantial factor for CTS. Specifically, he considered the physical aspects of job force, repetition, awkward posture, and contact stress. In addition, he considered the duration factors for each of these possible physical risks. Finally, he noted a lack of vibration and temperature extremes. In discussing and evaluating the personal and physical risks, Dr. Ollinger provided an excellent foundation for his ultimate conclusion that work was not the cause of Claimant's CTS.

By contrast, Dr. Poetz, who found a causal connection, did not provide any explanation for his conclusion. He took an adequate history and performed a complete examination, but he failed to offer any details on the critical issue of causation. Instead of discussing personal and physical risk factors like Dr. Ollinger, Dr. Poetz states, "[t]he patient attributes the repetitive use of her hands in performing the above job duties to the development of her bilateral hand complaints." In short, his conclusion does not have an adequately explained foundation. Furthermore, his ultimate conclusion is confusing at best. In sum, Dr. Poetz states the September 19, 2006 injury is the "substantial and prevailing factor" to the disability, and the disability is "directly resultant from the September 19, 2006 injury." The conclusion does not address the critical questions of whether and how Claimant's job activities caused her CTS. Dr. Poetz's opinion is insufficient to support an award of benefits to Claimant under the Missouri Workers' Compensation Law.

The most convincing and credible expert evidence compels a finding in favor of Employer on the issue of causation. I find Claimant did not establish with reasonable probability that her job duties as a guest services representative are the prevailing factor in the development of her bilateral CTS.

2. Medical Treatment and PPD.

Having determined Claimant's CTS is not causally connected to her work, I find Claimant is not entitled to medical treatment or any other benefits, including permanency.

CONCLUSION

Claimant does not have a compensable claim for CTS, and shall not recover any benefits under the Missouri Workers' Compensation Law. The Second Injury Fund claim is dismissed.

Date: _____ Made by: _____

Karla Ogrodnik Boresi
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

_____

Jeffrey W. Buker
Director
Division of Workers' Compensation

[1] I disagree. Under the prevailing factor standard, the occupational exposure must be a stronger causative factor "in relation to ***any*** other factor." There is no requirement that the occupational exposure rise to the level of a substantial causative factor. Assume an occupational disease claimant with the following causative factors: genetics – 80%, occupational exposure – 15%, hobby – 5%. The occupational exposure is the prevailing factor in the contraction of the occupational disease because the occupational exposure is the stronger causative influence in relation to the hobby.

[2] All statutory references are to the Missouri Revised Statutes (Cum. Supp. 2005) unless otherwise indicated.

[3] "If both employer and employe have elected to accept the provisions of this chapter, the employer shall be liable, irrespective of negligence, to furnish compensation under the provisions of this chapter for personal injury or death of the employe by accident arising out of and in the course of his employment, and shall be released from all other liability therefor whatsoever, whether to the employe or any other person."

[4] Renumbered §3695 RSMo in 1939.

[5] This provision makes no sense to me. The only diseases covered by the Law are occupational diseases. §287.110 RSMo. We will never get to the question of compensability for any disease until we have concluded that disease is an occupational disease. Is this section saying that even though an ordinary disease of life is itself an occupational disease, it is not compensable unless it follows as an incident of a *separate* occupational disease? That mind-boggler is for another day.

[6] "'Death' when mentioned as a basis for the right to compensation means only death resulting from such violence and its resultant effects occurring within three hundred weeks after the accident."

[7] I was a State Representative when the Missouri General Assembly ushered through the major 1993 amendments to the Law without specifically setting forth benefits for occupational diseases, so rest assured my observations are not designed to cast aspersions on the legislature that most recently failed to do so with the 2005 amendments to the Law.

[8] The legislature was no doubt aware of the *Staples* opinion because it amended §287.020.4 RSMo to add the following clause to the language quoted in footnote 6: "…except that in cases of occupational disease, the limitation of three hundred weeks shall not be applicable."

[9] Even if I err in concluding that the §287.120.2 release of liability is inapplicable, I think claimants will nonetheless have the right to pursue tort actions for the contraction of occupational diseases. I recognize this Commission has no authority to rule on constitutional issues, but I suspect the legislature's complete destruction of the common law remedy for the contraction of an occupational disease – undoubtedly an injury to the person for constitutional purposes – runs afoul of the open courts guarantee of the Missouri Constitution (Art I, §14), as well as, the state and federal due process clauses (Missouri Constitution, Art. I, §10; Constitution of the United States, 14th Amendment).

[10] At the time Dr. Ollinger saw Claimant, she only had right sided complaints.